

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 157,406

ORDER

The respondent files its Application for Review requesting the Appeals Board to review an Award entered by Administrative Law Judge John D. Clark on April 1, 1994. The Appeals Board heard oral argument in person in Wichita, Kansas.

APPEARANCES

Claimant appeared by and through her attorney, James Zongker of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Curtis Perry of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney Cortland Q. Clotfelter of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The respondent has requested the Appeals Board to review the following issues:

- (1) What is the nature and extent of claimant's disability?
- (2) What is the liability of the Kansas Workers Compensation Fund, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record and heard arguments of the parties, the Appeals Board finds as follows:

(1) Claimant claims permanent partial general disability benefits for work-related injuries to her upper extremities, shoulders and neck. She alleges that her injuries resulted from performance of her work activities while employed by the respondent from January of 1991 through October of 1992. Claimant's testimony was taken by deposition on November 25, 1992, and at that time she was currently employed by the respondent and had been working for the respondent for eleven (11) years. In 1990 she was employed as an area coordinator which required her to perform repetitive job activities with both hands. She first started developing symptoms in her neck, shoulders and wrist on the right side in October of 1990. Her supervisor was notified of these symptoms and she first sought medical treatment from her family physician, Dr. Winblad in Winfield, Kansas.

The claimant continued to work, with increasing symptoms on the right, performing her repetitive job duties. She is right-hand dominant and she commenced utilizing her left hand more because of her right-hand problems. Subsequently, her left arm and left shoulder became symptomatic.

On November 15, 1990, claimant sought medical treatment for her bilateral upper extremity problems with Dr. Paul Lesko, an orthopedic surgeon in Wichita, Kansas. Dr. Lesko diagnosed bilateral carpal tunnel syndrome and placed work restrictions on the claimant limiting lifting to twenty-five to thirty (25-30) pounds. Dr. Lesko had the claimant continue to work and prescribed conservative treatment consisting of physical therapy. Claimant testified that during this period of time her symptoms became more symptomatic.

Finally, the respondent referred the claimant for examination and treatment to J. Mark Melhorn, M.D., an orthopedic surgeon in Wichita, Kansas. Dr. Melhorn first saw the claimant on February 19, 1991. He examined the claimant and diagnosed a right and left median nerve entrapment, tenderness of the right and left wrist suggestive of ulnar nerve entrapment along with painful elbow and shoulder, specific etiology unknown. At that time, Dr. Melhorn prescribed conservative treatment in the form of education, exercise, modification of her work environment and physical therapy. However, the claimant's symptoms persisted and a right surgical release was performed on March 13, 1991, followed by a left surgical release on April 1, 1991. Claimant returned to work on May 7, 1991, with the following permanent restrictions prescribed by Dr. Melhorn:

- (1) Limit of twenty-five (25) pound lift and grip on a frequent basis;
- (2) Larger amount on an infrequent basis;
- (3) Limit repetitive gripping on both the right and the left to less than one-half (1/2) of the work day; and

- (4) Limited use of knives to less than one-half (1/2) of the work day.

Dr. Melhorn opined that the claimant's permanent partial functional impairment of the right forearm was eleven and one-tenth percent (11.1%) and of the left forearm was nine and three-tenths percent (9.3%). He did not combine these ratings into a body as a whole rating. Claimant was treated by Dr. Melhorn on a regular basis through December 7, 1992, the date of her last appointment. Dr. Melhorn provided treatment for her hands and wrists along with treating her shoulder and neck complaints. In regard to her shoulder and neck complaints, he diagnosed myofascitis of the right shoulder. An MRI was obtained of the claimant's cervical area which showed a slight extradural abnormality at the C5-C6 on the left. However, Dr. Melhorn did not assign a permanent functional impairment to the claimant as a result of her shoulder and neck complaints. During her last visit, the claimant expressed to Dr. Melhorn that she was continuing to work for the respondent on a more automated job and tolerating the job fairly well.

At the respondent's insurance carrier's request, claimant was seen by Paul D. Stein, M.D., a board-certified neurosurgeon, on February 6, 1992. After his examination of the claimant, Dr. Stein's impression was post carpal tunnel surgery with residual symptomatology and cervical disc herniation on the left. Dr. Stein opined that Dr. Melhorn's functional impairment ratings and permanent restrictions were reasonable and appropriate. Dr. Stein did not relate the claimant's neck complaints to her disc protrusion. It was his opinion that the neck symptomatology was related to myositis-musculoskeletal from overuse and prescribed a steroid injection as treatment. Dr. Stein saw the claimant again on February 25, 1992, and opined a three to five percent (3-5%) permanent partial impairment to the body as a whole relating specifically to the claimant's neck. He placed no additional permanent restrictions on the claimant's activities because of her neck problem. Dr. Stein did not recommend additional medical treatment and opined that surgery was not a viable option.

Claimant was examined and evaluated by Ernest R. Schlachter, M.D., on May 29, 1991 and August 14, 1991 at claimant's attorney's request. The purpose of these examinations was to obtain Dr. Schlachter's opinion as to claimant's permanent partial impairment of function and permanent restrictions as a result of claimant's work-related bilateral carpal tunnel syndrome, shoulders and neck complaints. After both examinations, Dr. Schlachter concluded that claimant had suffered from overuse syndrome of both arms, shoulder girdles, cervical spine with cervical arthritis and degenerative disc disease. During the August of 1992 examination, claimant had some increased pain in her neck and shoulders. However, Dr. Schlachter's opinion regarding permanent functional impairment of twelve percent (12%) to the body as a whole for each upper extremity combined with a fifty percent (50%) permanent partial impairment of function to the body as a whole for the cervical spine and both shoulders had not changed from the May 1991 examination. Dr. Schlachter combined these functional impairments to conclude that as a result of claimant's work-related injuries she had a thirty-five percent (35%) permanent partial impairment of function to the body as a whole. He also opined that the following permanent restrictions had not changed from his examination in May of 1991:

- (1) No repetitive pushing, pulling, twisting or grasping motions with either arm or hand;
- (2) No lifting over ten (10) pounds with either arm or hand;
- (3) No working above horizontal; and
- (4) No work requiring to work overhead.

Since the claimant had returned to work for the respondent at a comparable wage, work disability was not argued and is therefore not an issue to be decided in this matter. Consequently, claimant's permanent partial disability is limited to the extent of her functional impairment. See K.S.A. 1992 Supp. 44-510e(a). In this case, the Administrative Law Judge found that the claimant was entitled to a thirty-five percent (35%) permanent partial general disability based on Dr. Schlachter's functional impairment opinion only. The Administrative Law Judge did not consider Dr. Melhorn's opinion on functional impairment because Dr. Melhorn had not converted his separate upper extremity ratings to a body as a whole rating. The Administrative Law Judge also did not mention Dr. Stein's testimony or his rating of three to five percent (3-5%) of the whole body as a result of the claimant's neck injury.

The respondent argues that Dr. Melhorn's and Dr. Stein's functional impairment ratings should be given equal weight in determining claimant's permanent partial general disability. On the other hand, claimant argues that Dr. Schlachter's rating is the only appropriate rating because it is based on the combination of the claimant's bilateral upper extremity injuries, neck and shoulder injuries.

As the trier of fact, the Appeals Board has the right and obligation to weigh the evidence to determine the credibility of the witnesses, including the physicians who testify, in making its decision on the disability of the claimant. See *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 784-785, 817 P.2d. 212, rev. denied 249 Kan. 778 (1991). The Appeals Board finds in this case, after a review of the evidentiary record, that it is appropriate to consider both Dr. Melhorn's opinion and Dr. Stein's opinion in reference to arriving at claimant's functional impairment. Utilizing the AMA Guides, Third Edition, Revised, the Appeals Board finds that Dr. Melhorn's functional impairment rating of eleven and one-tenth percent (11.1%) to the claimant's right forearm converts to a seven percent (7%) whole body rating and his functional impairment rating of nine and three-tenths percent (9.3%) to the claimant's left forearm converts to a whole body rating of five percent (5%) which combines to a twelve percent (12%) whole body rating. Combining this twelve percent (12%) whole body rating with Dr. Stein's average whole body rating of four percent (4%) due to the claimant's neck problem, results in a sixteen percent (16%) whole body rating, utilizing the Combined Value Charts of the AMA Guides. Averaging this sixteen percent (16%) functional rating with Dr. Schlachter's thirty-five percent (35%) rating, the Appeals Board finds that the claimant is entitled to a twenty-five and one-half percent (25.5%) permanent partial general disability based on functional impairment.

(2) As to the question of the liability, if any, of the Kansas Workers Compensation Fund, the Appeals Board disagrees with the Administrative Law Judge's finding and the Kansas Workers Compensation Fund's argument that the respondent has failed to prove that the Kansas Workers Compensation Fund is liable for the workers compensation benefits awarded in this proceeding.

In the instant case, the respondent has placed in evidence three separate Form 88s filed October 15, 1990, February 8, 1991, and May 31, 1992. These Form 88s list claimant's preexisting conditions in regard to her right wrist, right shoulder, left wrist, left shoulder and cervical area. The respondent's filing of the Form 88s creates a presumption that the respondent had knowledge of the preexisting impairments. See K.S.A 1992 Supp. 44-567(b). Claimant's supervisor, Homer C. Conley, Jr., also establishes that in 1990 he knew that claimant was having problems with her wrists, neck and shoulders. Even after claimant's carpal tunnel surgery, Mr. Conley testified that the claimant had to return to a

production job instead of the area coordinating job because of her medical restrictions. It was Mr. Conley's opinion that the claimant's physical problems suffered in 1989 and 1990 caused her to be at a disadvantage in performing her work for the respondent. Additionally, the claimant wore wrist splints in 1990 while she was performing her work activities for the respondent. Dr. Schlachter established through his testimony that the claimant had preexisting conditions in her wrists, neck and shoulders and that the claimant's work activities permanently aggravated these preexisting conditions. Dr. Schlachter also opined that but for these preexisting conditions the claimant would not have had her resulting permanent functional impairment in her wrists and neck areas.

Based upon the above findings, the Appeals Board concludes that the respondent has met its burden of proof, that it knowingly retained a handicapped employee and claimant's resulting disability would not have occurred but for her preexisting physical impairments. Accordingly, all workers compensation benefits payable as a result of claimant's work-related injuries are ordered paid by the Kansas Workers Compensation Fund. See K.S.A. 1992 Supp. 44-567(a)(1).

All other findings of Administrative Law Judge John D. Clark, in his Award dated April 1, 1994, are incorporated herein and made a part hereof as if specifically set forth in this Order to the extent they are not inconsistent with the findings and conclusions expressed in this Award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark, dated April 1, 1994, is hereby modified and an Award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Judith Patterson, and against the respondent, Rubbermaid, Inc., and its insurance carrier, Lumbermens Mutual Casualty Company, and the Kansas Workers Compensation Fund, for an accidental injury sustained on October 31, 1992, and based on an average weekly wage of \$384.44.

Claimant is entitled to 8.11 weeks of temporary total disability compensation at the rate of \$256.30 per week or \$2,079.30, followed by a payment of \$65.36 per week for 406.89 weeks or \$26,594.33, for a 25.5% permanent partial general disability, making a total award of \$28,673.63.

As of April 28, 1995, there is due and owing the claimant 8.11 weeks of temporary total disability compensation at the rate of \$256.30 per week or \$2,079.30, plus 121.75 weeks permanent partial general disability at \$65.36 per week in the sum of \$7,957.58, for a total due and owing of \$10,036.88, which is ordered paid in one lump sum minus any amounts previously paid. Thereafter, the remaining balance of \$18,636.75 shall be paid at the rate of \$65.36 per week for 285.14 weeks until fully paid or further order of the Director Workers Compensation.

The Kansas Workers Compensation Fund is liable for one hundred percent (100%) of all compensation, medical expenses and costs incurred in this particular claim.

IT IS SO ORDERED.

Dated this ____ day of April, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James Zongker, Wichita, KS
Curtis Perry, Wichita, KS
Cortland Q. Clotfelter, Wichita, KS
John D. Clark, Administrative Law Judge
George Gomez, Director